83-304

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

M. MARSHALL LANDY,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Whether there is statutory authority under the Federal Aviation Act for the requirement of a commercial operator operating certificate?

Whether the regulatory mandate lacks sufficient specificity?

Whether petitioner was deprived of his statutory right to trial of factual issues?

Whether flights conducted under a lease to a foreign air carrier are subject to the primary jurisdiction of the Civil Aeronautics Board rather than the FAA?

Whether the judgment of the lower Court extends the extraterritorial jurisdiction of the FAA beyond traditional and practical limits and Congressional intent?

Whether the unprecedented fine is contrary to congressional intent and excessive within the meaning of U.S. CONST., EIGHTH AMENDMENT

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Other Authority

No._____

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix to this Petition (App. 1A) and is reported at 705 F.2d 624 (2d Cir. 1983). The opinion of the United States District Court for the Southern District of New York also appears in the Appendix (28A) and is unofficially

reported at 16 Avi. Cas. (CCH) 18,165 (S.D.N.Y. 1982).

Jurisdiction

The petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on May 23, 1983 (App.36A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

Statute and Regulations Involved

Constitutional Provision

AMENDMENT [VIII], Constitution
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Federal Aviation Act of 1958
49 U.S.C. § 1424(a) (1982):
The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

Code of Federal Regulations

14 C.F.R. § 1.1 (1982)
"Commercial Operator" means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of

Part 375 of this Title. Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit.

14 C.F.R. § 121.3(f) (1982)

No person (except a person covered by paragraph (a), (b), (c), (d) or (e) of this section) may engage in the carriage of persons or property for compensation or hire in air commerce without, or in violation of a commercial operator operating certificate and appropriate operations specifications issued under this part.

Statement of the Case

As the subject of an unprecedented fine in the sum of $378,000, petitioner M. MARSHALL LANDY has the unfortunate distinction of having sustained the largest collectable civil penalty ever imposed against an individual citizen in aviation history. This despite the absence of any allegation, claim, proof or suggestion that safety of flight was compromised.

Petitioner Landy is a retired businessman who, inter alia, during the relevant time period (1976-1977), engaged in the acquisition

of civil aircraft for the purpose of long term leasing and resale. He financed civil aircraft in this manner for more than 20 years without incident, regulatory infraction or suggestion that he functioned as an aircraft operator until August of 1977 when an aircraft leased by him to International Aircraft Leasing, Inc. (IAL) of New York[1/] was summarily seized by the Federal Aviation Administration (FAA) upon the grounds that it was used to carry property for hire without a commercial operator operating certificate in violation of Part 121 of the Federal Aviation Regulations.[2/]

The seizure of appellant Landy's aircraft was made to secure payment of a proposed compromise penalty of $100,000. Neither public

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1/ IAL is now defunct, its business destroyed by the Government's action against it. The fine against IAL, in the sum of $189,000, is uncollectable since there are to corporate assets.

2/ The Regulations made the subject of this litigation are contained in 14 C.F.R. 121.1 et seq. Reference hereafter to these and other Regulations contained in Chapter I of Title 14 will be preceded by the acronym "FAR", meaning Federal Aviation Regulation.

safety nor safety of flight was alleged as the basis of seizure.[3/]

Petitioner Landy sought injunctive relief in the U.S. District Court, Southern District of New York. IAL intervened, claiming a paramount right to the aircraft under a purchase option in the lease agreement. The Government counterclaimed seeking unprecedented fines from Landy, IAL, a Manhattan freight forwarder sued as J.D. Smith Inter-Ocean, Inc. (hereafter referred to as J.D. Smith) and Air Trans Ltd., a Bahamian corporation that was never served with process. The matter was twice tried to a jury by special verdict before Hon. Robert L. Carter. On appeal from the first judgment, that portion of the judgment dismissing petitioner Landy's affirmative action was affirmed and so much of the judgment entered upon the special verdict of the jury was reversed and remanded, 635 F.2d 143 (2d

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3/ Seizure of aircraft by the FAA under these circumstances has been held unlawful, U.S. v. Vertol, 545 F.2d 648 (9th Cir. 1976).

Cir. 1980). Retrial of the case resulted in a second verdict for the Government. Judgment entered thereon was affirmed with one Panel member dissenting in part, 705 F.2d 624 (2d Cir. 1983). Rehearing was denied.

The underlying factual circumstances may be briefly stated as follows:

Petitioner Landy leased a Boeing 707 cargo aircraft (N9985F) to IAL on April 28, 1977. The airplane was delivered under the terms of its lease in Miami where, according to the parties, Landy was divested of operational control in consideration of a downpayment of $90,000 and fixed monthly rent. IAL was given an option to purchase which made the lease a conditional sale under Section 101 of the Federal Aviation Act [49 U.S.C. 1301(19)]. The aircraft was ferried to Stewart Airport, New York. IAL then entered a series of short term subleases during the period between May 2 and August 2, 1977 with several Agri-corporations and others. The typical sublease provided, in pertinent part, that the sublessee (shipper)

assumed operational control and responsibility for the aircraft during the period of the sublease. The stated and recognized purpose of this provision was to make the sublessee the operator of the aircraft thereby permitting the sublessee to transport his property (livestock) overseas under the General Operating Rules of FAR Part 91 [14 C.F.R. 91.1 et seq.]. This to avoid the superadded expense and requirements of the Federal Aviation Regulations pertaining to the carriage of property for hire [14 C.F.R. 121.1 et seq.]. Referred to as "meathauling", this method of transportation is commonly used by the livestock industry. All of the flights in question were flown by competent pilots who contended they were hired as independent contractors. Air Trans Ltd. acted as a broker or employment agency in hiring the crews for N9985F. The president of Air Trans Ltd. Henry Warton, was a friend and business associate of petitioner. Mr. Warton's activities as airplane and crew broker, his use of petitioner's office and secretarial services and his reten-

tion from time to time as an agent for petitioner was heavily stressed by the Government in its case against Mr. Landy. Most of the flights originated at Stewart Airport and most of the shippers were corporate customers of J.D. Smith. Seven of the 28 flights made the subject of the judgment order took place entirely outside the United States and six of those while the aircraft was under lease to LANICA, the national airline of Nicaragua and the holder of a Foreign Air Carrier Permit issued by the Civil Aeronautics Board. All of the leases, including the main lease, were filed with the FAA. IAL was in constant touch with the FAA Field Office which was fully cognizant of the subleasing activities. Representatives of four of the shippers testified they were familiar with FAR Part 91 operations, intended what was recited in the lease agreements, considered the pilots to be the agents of their companies, and did, in fact, assume operational control and responsibility for the aircraft. There was indirect

evidence from a fifth shipper to the same effect. There was and is no evidence to the contrary on the issue of the shipper's intent.

Early in the course of IAL's activities, the FAA commenced an investigation into the question of unlawful carriage. Contrary to expressed agency policy, those under investigation were kept in the dark while the FAA's investigation progressed from the fact finding to the evidence gathering stage. When IAL was informally advised of the FAA's conclusions at a meeting in August of 1977, IAL immediately discontinued its subleasing activities on a voluntary basis. Mr. Landy sought to repossess the aircraft for non-payment of rent and caused a request for a ferry permit to be filed by Henry Warton with the FAA. Fearing the aircraft would leave its jurisdiction, the FAA's Eastern Region seized the aircraft summarily.

In its Notice of Seizure, the FAA alleged violation of FAR Part 121 and told petitioner he could have his property back if he paid a

fine of $100,000. There was no allegation respecting safety of flight or the violation of any of the provisions of the General Operating Rules of FAR Part 91. The Notice of Seizure also omitted any allegations with respect to the seven flights conducted entirely outside the United States. Charges with respect to these flights were never made a part of the Government's case until closing argument in the second trial. The judgment of the District Court, based in part on the flights outside the United States, was affirmed with J. Van Graafeiland dissenting in part on the grounds that the flights conducted outside the United States are not subject to FAA jurisdiction under section 901 of the Act [49 U.S.C. 1471], 705 F.2d. at 637.

Preliminary Statement In Support of the Petition

Petitioner believes the discretion of the Court should be exercised in his favor because the petition presents important and novel questions relating to enforcement under the

Federal Aviation Act [49 U.S.C. 1301 et seq.]. Specifically, the petition probes the jurisdiction of the enforcement agency, its authority to issue and require operating certificates other than those specified in the Act, the specificity of the regulatory mandate involved and the constitutionality of the unprecedented fine imposed against petitioner.

Reasons for Granting the Writ

I.

THERE IS NO STATUTORY AUTHORITY UNDER THE FEDERAL AVIATION ACT FOR THE REQUIREMENT OF A COMMERCIAL OPERATOR OPERATING CERTIFICATE

As observed by the majority, "[t]he Federal Aviation Act requires carriers 'to perform... services with the highest [possible] degree of safety'" [49 U.S.C. 1421(b), emphasis added], 705 F.2d at 636.[4/] In furtherance of the congressional charge to "give full consideration to the duty resting upon air carriers" [49 U.S.C. 1421(b), emphasis added], the

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4/ The bracketed word "possible" was omitted from the Majority's quote of the statutory text.

Secretary has established a scheme of regulation which contemplates adherance by air carriers to air carrier regulations in addition to those found in the general operating rules of FAR Part 91. The air carrier regulations are found in FAR Part 121. These regulations set forth the minimum standards required to meet "the highest possible degree of safety" mandated by Congress, Majority's opinion at 705 F.2d 636, citing In Re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 635 F.2d 67,75 (2d Cir. 1980).

Petitioner and codefendant IAL were found by the jury to have acted collectively, although not separately, as a commercial operator without an operating certificate required by FAR 121.3(f). As a consequence, and by reason of FAR 121.4, petitioner was found to have violated sundry other provisions applicable to air carrier operations.

FAR 121.3(f), in pertinent part, states as follows:

> "No person...may engage in the carriage of persons or property for compensation or hire in air

commerce without... a commercial operator operating certificate...."

FAR 1.1, in pertinent part, defines a "commercial operator" to mean:

> "...[A] person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or a foreign air carrier..." [emphasis added, 14 C.F.R. 1.1].

There is no authority in the Federal Aviation Act [49 U.S.C. 1301, et seq., hereafter referred to simply as the Act] for the issuance of an operating certificate to a person, as defined in section 101 of the Act [49 U.S.C. 1301(32)], who is "other than... an air carrier or a foreign air carrier...".

Section 604(a) of the Federal Aviation Act [49 U.S.C. 1424(a)] states as follows:

> "The Secretary of Transportation is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued" (emphasis added).

To the extent the FAA has established a category of persons known as commercial opera-

tors that is something "other than... an air carrier" and to the extent the FAA holds these persons to the "highest possible" standard pertinent to air carriers, the FAA obliterates the distinction required to be made between "air commerce" and "air transportation" and defeats the mandate of section 601(b) of the Act [49 U.S.C. 1421(b)], which, in pertinent part, states as follows:

> "In prescribing standards, rules, and regulations, and in issuing certificates under this title, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce." [footnote omitted]

II.

THE REGULATORY MANDATE LACKS SUFFICIENT SPECIFICITY

Petitioner Landy contends that unless specifically prohibited, citizens governed by a dichotomous scheme of positive law may

freely opt for the lower of two standards providing such election does not endanger public safety or adversely affect the legitimate interests of another. In the circumstances of this case, petitioner's lessee (IAL) and the livestock owners entered agreements whereby the livestock owners knowingly assumed operational control over the aircraft during the periods of their respective leases. All of the trial testimony, and there was no evidence to the contrary, was to that effect and to the effect that petitioner Landy and IAL intended that petitioner surrender operational control to IAL.

The position of the Government, as sustained by the judgment of the lower court, is that the actual intent of the participants is immaterial in that the owner and/or lessor of the aircraft will be deemed to retain operational control if the services of the crew are furnished or even recommended by the owner or lessor, see Majority Opinion, 705 F.2d at 632. Such position is not evident from the text of the Federal Aviation

Regulations, particularly the regulatory definitions of "commercial operator" and "operational control" in FAR Part 1 [14 C.F.R. 1.1]. Indeed, lack of requisite specificity was cited by the FAA in its preamble to new FAR Part 125 [14 C.F.R. 125.1] wherein it was said "...the economic test of 'compensation or hire' has proved to be a nebulous guide to both the FAA and the aviation community in attempting to determine whether operations fall within Part 91 or... Part 121:, 67214 Fed. Reg. Vol. 45, No. 198 of 10/8/80. See, with respect to the requirement of regulatory specificity, Pike v. C.A.B., 303 F.2d 353 (8th Cir. 1962 per J. Blackmun).

III.

PETITIONER WAS DEPRIVED OF HIS STATUTORY RIGHT TO TRIAL THE FACTUAL ISSUES

Section 903(b)(1) of the Federal Aviation Act provides, in pertinent part, that "...with respect to proceedings involving penalties... either party may demand trial by jury of any issue of fact..." [49 U.S.C. 1473(b)(1)].

Petitioner's counsel sought without

success to have the jury determine questions of fact relating to petitioner's intent to engage in carriage for hire. Such element was held by the trial court to be irrelevant to the violation of FAR 121.3(f). See Also Majority opinion 705 F.2d at 631, 632. Counsel for petitioner also requested that a jury determination be made as to the nature of the relationship between petitioner and Air Trans Ltd., the Bahamian corporation that was alleged to have provided crew services to the shippers as the agent for petitioner and codefendant IAL; i.e., whether, as a matter of fact, an agency was found to exist.[5/] Although the trial court denied petitioner's request for special interrogatories, it nevertheless determined factual issues against petitioner relating to intent and agency, as well as good faith and veracity in fixing an unprecedented and, it is respectfully

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5/ Contrary to the opinion of the Majority at 705 F.2d 632, agency was "an element of the complaint" and an issue that should have been specifically resolved by the jury as requested by defense counsel.

submitted, an excessive fine within the prohibition of the 8th Amendment.

IV.

FLIGHTS CONDUCTED UNDER A LEASE TO A FOREIGN AIR CARRIER ARE SUBJECT TO THE PRIMARY JURISDICTION OF THE CIVIL AERONAUTICS BOARD RATHER THAN THE FAA

Even if it could be said the seven flights conducted entirely outside the United States came within the ambit of "air commerce" as defined in the Federal Aviation Act, six of those flights were subject to lease agreements with the holder of a foreign air carrier permit issued by the Civil Aeronautics Board (CAB). Accordingly, the provisions of FAR Part 129 [14 C.F.R. 129.1 et seq.] rather than FAR Part 121 would apply to those flights, U.S. v. Keuylian, 602 F.2d 1033 (2d Cir. 1979); FAA Notice N8000.158 9/8/77; FAA Advisory Circular AC-91;-38A, ¶14; 14 C.F.R. 129.1. Moreover, the conduct of foreign air carriers under the circumstances of "wet lease" arrangements (aircraft plus crew) involving U.S. Registered aircraft is a matter that comes within the province of the CAB and

its primary jurisdiction; 14 C.F.R. 218.1 et seq. Indeed, the subject matter of the Government's enforcement action is really economic rather than operational in nature, Preamble to New FAR Part 125, 67214 Fed. Reg., Vol. 45, No. 198 of 10/8/80 and, as such, has been within the traditional sphere of CAB enforcement, Las Vegas Hacienda v. C.A.B., 298 F.2d 430, 436 (9th Cir. 1962), cert. denied 399 U.S. 885 (1962); M & R Investment Company d/b/a/ Dunes Hotel and Casino, et al. v. C.A.B., 308 F.2d 49 (9th Cir. 1962); Handbook for Handling Legal Aspects of FAA Enforcement Program, HB 2150.2, pp. 56-57; FAA Handbook: Compliance and Enforcement, 8030.7A, p. 150.

V.

THE JUDGMENT OF THE LOWER COURT EXTENDS THE EXTRATERRITORIAL JURISDICTION OF THE FAA BEYOND TRADITIONAL AND PRACTICAL LIMITS AND CONGRESSIONAL INTENT

Seven of the flights made the subject of the lower court's judgment were conducted entirely outside the United States. Although it was apparently recognized that "air

commerce" does not include flight operations conducted outside the territorial limits of the United States unless "foreign air commerce" is endangered, the Second Circuit's majority perceived the failure to comply with the provisions of FAR Part 121 to be a potential if not actual threat to other aircraft that may have been affected by the operation of N9985F and which may have been engaged in "foreign air commerce"; i.e., "commerce between a place in the United States and any place outside thereof" [49 U.S.C. § 1301(24)], 705 F.2d at 634.

The majority's perception, it is respectfully submitted, displays a misunderstanding of the regulatory scheme; particularly the dichotomous standard established by Congress in the distinction between "air commerce" [49 U.S.C. §1301(4)] and "air transportation" [49 U.S.C. §1301(24)].

The FAA promulgated FAR Part 121 in response to the congressional mandate that "... the Secretary (in prescribing regula-

tions)... give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce..." [49 U.S.C. 1421(b)]. Thus, aside from establishing a superadded standard reflecting the difference between the broad concept of air commerce and the narrow notion of air transportation (common carriage), FAR Part 121 is addressed primarily to the operational relationship existing between an air carrier and the passengers and cargo carried aboard its aircraft.

The general operating rules of FAR Part 91 [14 C.F.R. § 91.1 et seq.], to which there was compliance in this case, define a high although lower standard of safety than the highest possible degree required under FAR Part 121. In the circumstances of an aircraft subject to the superadded provisions of FAR Part 121, the conduct of the operator with respect to those served by him is regulated by Part 121 whereas his conduct towards other

aircraft, persons and property is governed by the general operating rules of FAR Part 91. Since the regulatory scheme as it existed in 1977 permitted large aircraft like N9985F to be operated privately and thus exclusively under the provisions of FAR Part 91, other aircraft which N9985F may have affected were entitled to no greater protection under the Federal Aviation Regulations than that provided under the high safety standard embodied in the general operating rules of FAR Part 91. Expressed conversely, the hypothetical aircraft carrying hypothetical passengers from the United States on the hypothetical "...scheduled passenger flights to Caracas and San Jose", 705 F.2d at 634 were not endangered in the actual, potential or conceptual sense by N9985F adhering to a high (FAR Part 91) rather than the "highest possible" (FAR Part 121) standard of safety. These hypothetical aircraft were no more threatened (in the academic sense) by N9985F than they would have been by the vast majority of U.S. registered aircraft which similarly do

not operate under the stringent requirements of FAR Part 121.

In short, one aircraft cannot be said to endanger another aircraft operating in foreign air commerce unless one of the provisions of the general operating rules are violated. Since there was no allegation or finding that N9985F was operated in violation of FAR Part 91, it cannot be logically held that other aircraft were endangered by the operation of N9985F. Absent the element of endangerment and the possibility thereof, flights conducted entirely outside the United States are not within the ambit of the statutory definition of air commerce.[6/] Obviously, if the LANICA flights were not conducted in "air commerce", they cannot be said to be violative of FAR

6/ The absense of the element of endangerment is also evident from the fact that the Government did not allege endangerment under FAR Part 121 [14 C.F.R. 121.553 and 121.537(f)]. This despite "throwing the book" at defendants, 705 F.2d 638, in an effort to maximize the fine. Moreover, the FAA determined administratively the violations, if any, by the pilots were technical in nature, did not involve a compromise of safety and did not require formal charges.

121.3(f), Brunswick v. Pueblo Bowl-O-Mat,Inc., 429 U.S. 477, 489 (1977). That Congress did not intend the concept of air commerce to be limitless is evident from the statutory definitions of that phrase [49 U.S.C. 1301(4)] and "foreign air commerce" [49 U.S.C. 1301(23)]. However, since there is no specific statutory language to the contrary, the orfdinary and traditional limits of sovereignty must be assumed to govern enforcement under section 901 of the Act [49 U.S.C. 1471] no matter how expansive the notion of air commerce. This because "[w]e should not impute to Congress an intent to punish all whom its courts catch for conduct which has no consequences in the United States", U.S. v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945, per J. Learned Hand).

Despite apparent recognition of the limits of "air commerce", the lower court expanded section 901 enforcement jurisdiction under a speculative and fallacious endangerment theory in a way that renders the concept

of air commerce virtually limitless. This was done without precedent in aviation case law and, as pointed out in the dissenting opinion, without any claim of such jurisdiction by the administrative agency charged with air safety enforcement, 705 F.2d 624, at 637. Had Congress intended, as the Majority apparently found, 705 F.2d 634, that section 901 enforcement jurisdiction should adhere extraterritorily simply by virtue of the FAA airmen and aircraft certificates held,[7/]

7/ Although the lower court assumed all crewpersons were U.S. airmen, the record is far from clear on this. Petitioner had no opportunity to defend himself or develop a record in this regard because "charges" respecting the LANICA flights were never made or even mentioned until closing argument by Government counsel.

Congress would have so stated in the Act.[8/] And, had such mandate been expressed in the Act, it would conflict with treaty provisions respecting airspace sovreignty, Chicago Convention, Art. 1, 61 Stat. 1180, T.I.A.S. 1591; Denno, States Jurisdiction in Aerospace Under International Law, 36 Jour. Air Law & Com., 688, 698 (1970).

The endangerment theorized by the Majority was utterly without conceivable reality. Nevertheless, assuming, arguendo, a remotely poterntial endangerment, such does not warrant extension of Section 901 jurisdiction to flights that were conducted entirely outside the United States while an

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8/ In contrast to the heretofor recognized territorial limits of enforcement under Section 901 of the Act, enforcement jurisdiction under Section 609 [49 U.S.C. 1429 does adhere by virtue of the airmen and aircraft certificates issued by the FAA. Thus, subject to the limitations of existing treaty provisions, British Caldonian Airways Ltd. v. Adm'r of FAA, 665 F.2d 1153 (D.C. Cir. 1981), enforcement action under Section 609 against an FAA certificate may be taken as a consequence of acts committed outside the United States, Haines v. Adm'r of FAA, 449 F.2d 1073 (D.C. Cir. 1971).

aircraft is under lease to the national airline of a foreign government, National Bank of Canada v. Interbank Card Ass'n., 666 F.2d 6 (2d Cir. 1981); Hansen v. Arabian American Oil Co., 100 F. Supp 183 (E.D.N.Y. 1951), aff'd 195 F.2d 682 (2d Cirl. 1951), cert. denied, 344 U.S. 828 (1952).

VI.

THE UNPRECEDENTED FINE IS CONTRARY TO CONGRESSIONAL INTENT AND EXCESSIVE WITHIN THE MEANING OF THE U.S. CONSTITUTION, EIGHTH AMENDMENT

The authority of the district court to impose fines up to a maximum of $1,000 for each violation is not disputed, 49 U.S.C. 1471. What is questioned is the manner in which "violations" are counted. Under the artiface of a regulatory provision (FAR 121.4) promulgated several years after the enactment of the Federal Aviation Act, an essentially monomerous offense is made multifarious. The irony of the FAA's position in this case is that its counsel expressed doubt about the validity of the agency's multiplication process during congressional hearings on the

FAA sponsored Bill to increase penalties under the Federal Aviation Act [Testimony of Clark Onstad, Chief Counsel, FAA before the Subcommittee on Aviation of the Committee on Public Works and Transportation, House of Representatives, 96th Congress, 2d Session, July 1, 1980; at page 37 of Record of Hearing on H.R. 7488].

The interpretation of Section 901 [49 U.S.C. 1471] adopted by the district court is without support in the legislative history of the Act, case authority or the policies of the FAA and CAB as expressed in the FAA Enforcement Handbook, HB 2150.2, pp. 56-57. To the extent that Section 901 refers to continuing violations in terms of "each day" as opposed to each flight or flight operation, the interpretation given Section 901 by the district court conflicts with congressional intent. See U.S. v. J.B. Williams (2d Cir. 1974), 498 F.2d 414, at 435. Unless a statute is "decisively clear on its face", it must be construed to impose a single rather than a multiple penalty, U.S. v. Universal C.I.T.

Credit Corp 344 U.S. 218, 224 73 S. Ct. 227, 97 L.Ed. 260 (1952); U.S. v. WIYN Radio, Inc., 614 F.2d 495, 497 (5th Cir. 1980); see also U.S. v. Minutti, 639 F.2d 107, 113 (2d Cir. 1981); Brown v. U.S. 623 F.2d 54, 57 (9th Cir. 1980); U.S. v. Johnson, 612 F.2d 843, 845 (4th Cir. 1979). Since IAL voluntarily ceased its operations immediately upon being told of the FAA's position, and considering, particularly the evident delay by the agency in notifying the defendants of its conclusions or even of the investigation itself, the violation, if any, was not truly one that could be considered continuing in nature. Indeed, it is clear the FAA allowed the situation to "ripen" while it built up its case.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Dated: August 22, 1983

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 448, 455—August Term, 1982

(Argued December 16, 1982 Decided April 11, 1983)

Docket Nos. 82-6132, 82-6162

FEDERAL AVIATION ADMINISTRATION and UNITED STATES of AMERICA,

Appellees,

—v.—

M. MARSHALL LANDY and INTERNATIONAL AIRCRAFT LEASING, INC.,

Appellants.

Before:

OAKES, VAN GRAAFEILAND, and MESKILL,

Circuit Judges.

Appeal from judgment imposing civil penalties after a jury trial finding violations of Federal Aviation Act safety regulations. Although operations were conducted in form

of subleases purporting to transfer operational control to shipper, where owner-lessor supplied plane and, through alter ego, crews; and where lessee directed and made shipping arrangements and handled aircraft maintenance, the United States District Court for the Southern District of New York, Robert L. Carter, Judge, and a jury correctly found that owner and lessee both engaged in operation of aircraft for compensation or hire, and thus were subject to 14 C.F.R. Part 121 safety regulations.

Affirmed.

FRANK H. GRANITO, JR., Speiser & Krause, P.C., New York, N.Y. (John J. Halloran, Jr., Speiser & Krause, P.C., New York, N.Y., on the brief) *for Appellant M. Marshall Landy.*

HOWARD F. CERNY, New York, N.Y., *for Appellant International Aircraft Leasing, Inc.*

STEVEN E. OBUS, Assistant United States Attorney, Southern District of New York (John S. Martin, Jr., United States Attorney for the Southern District of New York; Michael H. Dolinger, Thomas D. Warren, Assistant United States Attorneys, Southern District of New York, of counsel) *for Appellees.*

Opinion of the United States Court of Appeals

OAKES, *Circuit Judge:*

M. Marshall Landy and International Aircraft Leasing, Inc. (IAL) appeal from a judgment imposing civil penalties of $378,000 against Landy and $189,000 against IAL for violations of safety regulations promulgated under the authority of subchapter VI of the Federal Aviation Act, 49 U.S.C. §§ 1421-32 (1976 & Supp. IV 1980). The United States District Court for the Southern District of New York, Robert L. Carter, Judge, entered the judgment after a jury returned special verdicts finding by a preponderance of the evidence that Landy and IAL both operated a Boeing 707 for compensation or hire on forty-three separate flights from May 2, 1977 to August 2, 1977.[1] Each flight violated twenty-seven Federal Aviation Regulations (FARs); one flight violated twenty-eight FARs.[2]

[1] This trial was the second in this case. This court reversed and remanded the first judgment because of defects in the jury interrogatories, particularly the failure to have the jury determine which violations occurred during which flight. *Landy v. FAA*, 635 F.2d 143, 145-47 (2d Cir. 1980).

[2] Its special interrogatories, the jury found the following violations of Federal Aviation Regulations (FARs), 14 C.F.R. Part 121: (1) engaging in the carriage of property for compensation or hire in air commerce without a commercial operator operating certificate, FARs 121.3(f) and 121.45(a); (2) engaging in the carriage of property for compensation or hire in air commerce without FAA-issued operations specifications, FARs 121.3(f), 121.43, and 121.45(b); (3) failure to inform employees of portions of the operations specifications applicable to their duties and responsibilities, FAR 121.75(a); (4) failure to conduct 50 hours of proving tests, FAR 121.163(a); (5) failure to demonstrate to the FAA ability to carry out aircraft ditching procedures, FAR 121.291(d); (6) extended overwater operation without a life preserver on board the aircraft for each occupant, FARs 121.303(a), (d) and 121.339(a)(1) (one flight found to violate these FARs); (7) operation without regular inspection of the airplane's emergency equipment, FAR 121.309(b)(1); (8) extended overwater operation without clearly identified emergency equipment, especially a life raft, marked to indicate its method of operation, FARs 121.309(b)(3) and 121.339(a)(2); (9) take off without first-aid equipment, FAR 121.309(b), (d); (10) take off without having provided aircraft crews

The factual and legal defense was that the plane's operations did not make Landy and IAL subject to these regulations, found in 14 C.F.R. Part 121, because Landy and IAL were not commercial operators of the Boeing 707, but rather subleased it to customers who operated it. On appeal, they challenge the sufficiency of the evidence on this point. Additionally, they challenge procedural and evidentiary rulings, the court's charge to the jury, and the scope of the sanctions.[1] We hold that the jury's findings

with an approved cockpit check list procedure, FAR 121.315(a); (11) operation without an approved cockpit checklist readily usable in the cockpit, FAR 121.315(c); (12) operation without an approved flight recorder, FAR 121.343; (13) operation without a working cockpit voice recorder, FAR 121.359; (14) operation without a ground proximity warning-glide slope deviation alerting system, FAR 121.360; (15) failure to prepare and keep current a manual for the use and guidance of flight, ground operations, and management personnel, FARs 121.133, 135; (16) failure to furnish manuals as required, FAR 121.137; (17) failure to have appropriate parts of the manual on the airplane, FAR 121.139; (18) failure to maintain the airplane in accordance with the maintenance portion of the manual, FAR 121.369(b); (19) failure to include a chart or description of the maintenance organization in an operator's manual, FAR 121.369(a); (20) failure to establish and maintain a system for continuing analysis and surveillance of the performance and effectiveness of the inspection and maintenance programs, FAR 121.373(a); (21) failure to have a training program for personnel performing aircraft maintenance, FAR 121.375; (22) failure to assign each crew member specific functions to perform in emergency situations, FAR 121.397(a); (23) failure to include the emergency functions assigned to each crew member in the manual, FAR 121.397(b); (24) failure to establish a training program for all crew members and airplane dispatchers, FARs 121.401(a), 403; (25) failure to obtain FAA approval of the training program, FAR 121.405; (26) use of pilots in command of the airplane, who had not passed a line check within the preceding year, FAR 121.440; (27) use of pilot flight crew members who had not completed proficiency checks within the preceding year, FAR 121.441; (28) failure to comply with flight route and airport familiarity certification for pilots, FARs 121.443, .445.

[1] For the purpose of imposing civil penalties, the court chose to count each complete flight (twenty-eight flights), rather than each leg of a continuous itinerary as a separate flight (forty-three flights), as the jury had done.

of fact were neither clearly erroneous nor affected by an erroneous charge; that the trial judge neither erred as a matter of law nor abused his discretion in the rulings; and that the calculation of fines was correct, and we therefore affirm the judgment.

I. The Regulatory Scheme

The Federal Aviation Administration (FAA) has authority to promote aircraft safety by regulation of civil aircraft in air commerce. 49 U.S.C. § 1421(a). Any operation that "directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce" is included in the definition of air commerce. 49 U.S.C. § 1301(4). Pursuant to general statutory authority, the Administrator of the FAA has issued extensive rules, regulations and minimum standards designed to enhance the safety of civil aeronautics. *See generally* 14 C.F.R. Parts 1-199.

Of particular relevance to this case are two portions of those regulations, art 91 and Part 121. Part 91 sets forth "general operating and flight rules" for "the operation of aircraft . . . within the United States" and, with limited exceptions, for the operation of "civil aircraft of U.S. registry outside of the United States." 14 C.F.R. § 91.1(a)-(b). In addition to these rules of general applicability, the FAA has promulgated a far more extensive and stringent set of rules for certification and operation of aircraft for what is commonly considered commercial

The final judgment imposed half the statutory maximum civil penalty for each of Landy's violations and one quarter the statutory maximum civil penalty for each of IAL's violations, awarded costs to the Government, and enjoined the defendants from operating a large aircraft for compensation or hire without complying with Federal Aviation Administration regulations. Judge Carter's opinion is reported at 16 Av. Cas. (CCH) 18,165 (S.D.N.Y. Feb. 9, 1982).

aviation.[4] Part 121 applies to two types of aviation: (i) air carriers, 14 C.F.R. § 121.1(a)(1)-(4), and (ii) commercial operators when they engage "in the carriage of persons or property in air commerce for compensation or hire." 14 C.F.R. § 121.1(a)(5). This case concerns the second of these two categories.

The statute provides that "[a]ny person who causes or authorizes the operation of the aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft" within the meaning of the Federal Aviation Act. 49 U.S.C. § 1301(31) (Supp. IV 1980). A "commercial operator" is defined by its ordinary meaning.[5] Operators for compensation or hire must obtain FAA approval.[6] Together with

[4] At the time of the events in this case, the applicability of the more stringent commercial aviation safety regulations, FARs Part 121, depended on resolution of a threshold economic question: "Where it is doubtful that an operation is for 'compensation or hire', the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit." 14 C.F.R. § 1.1 (defining "commercial operator"). For reasons developed in our opinion, we find that Landy and IAI were commercial operators.

The Federal Aviation Administration has since enacted further certification and operating regulations for airplanes with a maximum payload capacity of 6,000 pounds or more or seating capacity of 20 or more. 14 C.F.R. Part 125 (1982). Thus, the issue of who maintains operational control of the airplane during a sublease, the question that involved juries in two trials and circuit judges in two appeals, is of diminished significance in the aviation world today.

[5] " 'Commercial operator' means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this Title. . . ." 14 C.F.R. § 1.1.

[6] The appellants contend that the FAA may not issue or require operating certificates that are "other than . . . air carrier" or airport operating certificates, and thus that FAR 121.3(f) lacks legislative authority and FAR 121.4 conflicts with congressional intent. But the statute is plainly broad enough to empower the FAA to regulate

an operating certificate, 14 C.F.R. § 121.3(f), they must also obtain operations specifications, which determine such matters as the type of operations authorized, areas of operation, time limits for inspections and overhauls, airport authorizations and limitations, and weight and balance requirements for the aircraft. 14 C.F.R. § 121.45(b). To obtain a certificate and operations specifications, operators must demonstrate to the FAA their ability to comply not only with their terms, but also with the other regulations of Part 121 applicable to operations for compensation or hire. These regulations go to such varied matters as qualifications and training of maintenance and flight personnel, equipment required in the aircraft and on the ground, and preparation of detailed manuals governing inspection, maintenance and operation of the aircraft.

Under the Federal Aviation Act, noncompliance may result in revocation of certification, 49 U.S.C. § 1429, civil fines, *id.* § 1471, or criminal penalties, *id.* § 1472. Failure to comply with any of the applicable regulations subjects a person to civil penalties "not to exceed $1000 for each such violation;" each day of continuing violations is a separate offense. 49 U.S.C. § 1471(a)(1). *See* 49 U.S.C. § 1430(a)(5) (prohibiting operation of aircraft in air commerce in violation of FAA rules, regulations, or certification). Collection of such penalties is ordinarily by civil suit against the violator, 49 U.S.C. § 1473(b)(1), and either party may demand a trial by jury "of any issue of

commercial operators. 49 U.S.C. § 1421(a)(6); *see* discussion *supra*. There is a history of such enforcement. *See, e.g., B & M Leasing Corp. v. United States*, 331 F.2d 592 (5th Cir. 1964) (per curiam); *United States v. Bradley*, 252 F. Supp. 804 (S.D. Tex. 1966). The legality of this authority is furthermore the law of this case. *Landy v. FAA*, 635 F.2d at 147-48.

fact" that has not previously been determined in an administrative hearing. *Id.*

II. Operation of the Aircraft

Landy bought a Boeing 707 from a German airline in 1976. The plane was converted to carry cargo. Landy and IAL executed a one year lease agreement on April 28, 1977. Between May 2 and August 2, 1977, IAL entered into a series of subleases. Most of these subleases, operating out of Newburgh, New York, involved transportation of livestock to foreign airports. On occasion, the plane was ferried by an American crew to a foreign airport, and these crews flew seven trips between foreign airports. A typical sublease contract stated that the shipper-lessee would have

> full and exclusive possession, use and control of the Aircraft, shall have the sole responsibility for operation, use and control, for pilot assignment and direction, and for all other aspects of utilization of the Aircraft. Lessee shall obtain from a reputable aircraft service company or employ directly properly certified crew members . . . [who] shall be under the complete supervision, direction and control of Lessee and not in any way under the supervision, direction or control of or in any way responsible to Lessor.

Before the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, a party could demand a jury trial of any issue of fact regardless of whether there had been an agency hearing on the issue of regulatory violations and penalties. As amended, 49 U.S.C. § 1473(b) (Supp. IV 1980), allows trial de novo only of facts not previously determined in the administrative hearing. *See* H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 117, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3773, 3817-18. The amendment, even if it were applicable to these 1977 events, would not change the procedural history of this case, because there was no administrative hearing.

Thus, at all times, Landy and IAL operated in form as if the plane were leased to the cargo shipper who controlled its operation, bringing the flights under the General Operating Rules, 14 C.F.R. Part 91. The jury, however, found that Landy and IAL retained control of the flights, which were operated for compensation, and should therefore have complied with the stricter certification, inspection and maintenance requirements of 14 C.F.R. Part 121.

A. *Landy.* The link between Landy and operational control of the plane is Henry Warton, president of Air-Trans Ltd., an entity the jury apparently concluded was a shell company for Landy.[5] Warton told Landy in the summer of 1976 that Lufthansa was interested in selling the aircraft. Warton brought the Lufthansa representative to Landy to negotiate the sale, went to Germany to complete the paperwork, accompanied the plane back to Miami where he supervised its refitting from passenger to cargo configuration, and supervised the preparation of an inspection program and application for airworthiness certification by the FAA. Warton then found a party willing to lease the plane. He negotiated the IAL lease under which the plane operated during the three-month period at issue here, and delivered the plane to IAL at Stewart Airport in New York State. Warton notified IAL in August 1977 that Landy was terminating the lease, repossessed the plane for Landy several weeks later, and then supervised the operation of various of Landy's aircraft both directly for Landy and under lease to other parties. Indeed, because Warton was to receive twenty-

[5] Air-Trans Ltd., a Bahamian corporation listed as a defendant in the action, apparently was not served with the Government complaint. The first trial proceeded against Landy, IAL, and J.D. Smith. *FAA v. Landy*, 635 F.2d at 145.

five percent of Landy's profits from operation of the aircraft for his services as broker on the original sale, the jury could have concluded that Landy and Warton were joint venturers.

Warton's company, Air-Trans Ltd., supplied all the crews for all the subleased flights. Air-Trans appeared as transferee on the bill of sale when Landy purchased the aircraft from Lufthansa and authorized the work order for inspection of the aircraft in Florida. Moreover, Air-Trans had no office of its own. Warton conducted Air-Trans' business from Landy's office, including the payment of crew members for the aircraft and, frequently, supervision of the crews when they conducted overseas flights. Landy's secretary signed all the Air-Trans checks paying crew members for their services.

B. *IAL*. The link between IAL and operational control of the plane is J.D. Smith Inter-Ocean, Inc. (J.D. Smith), the company serving as IAL's exclusive sales agent.[9] IAL relied on the terms of the sublease agreements to prove that IAL was not responsible for operation of the aircraft. The evidence, however, indicated that IAL and J.D. Smith performed virtually all of the functions necessary to operate the aircraft, and the shippers were almost entirely excluded from any responsibility for the aircraft or its operation. A shipper would ask the air export manager of J.D. Smith to arrange for shipment of cargo. The manager would then send a sublease agreement

[9] J.D. Smith acquired an exclusive sales agency in exchange for lending IAL $10,000 to help pay for the lease of Landy's plane. Following the first trial, *see* note 1 *supra*, the court entered judgment against J.D. Smith in the amount of a $20,000 civil fine. J.D. Smith entered into a stipulation of settlement with the Government in September, 1979, under which the court entered an amended judgment imposing civil penalties and enjoining J.D. Smith from future violations.

prepared by IAL. At the same time, the manager obtained from IAL the cost charged by IAL for the flight, and from Air-Trans the cost of the crew, and would inform the shipper of the total cost. The shipper was responsible only for delivering the cargo to the airport when IAL specified that the plane would be ready. IAL provided maintenance, fuel and all auxiliary services for the plane, either directly or through airport personnel, who billed IAL or J.D. Smith, not the shipper. J.D. Smith supplied animal storage equipment, refitted the plane for each cattle-carrying flight, and disbursed the shipper's lump sum payment to Air-Trans (for the crew) and to IAL (for the other costs of operation).

The language of the subleases notwithstanding, the jury could conclude that IAL, by handling the shipping arrangement and payments directly and through J.D. Smith, as well as Landy, by supplying the aircraft and, through Warton and Air-Trans, the crews, had control of the plane. The facts support the jury's finding that IAL and Landy both operated the plane for compensation or hire, and therefore that IAL as well as Landy should have complied with Part 121 of the Federal Aviation Regulations governing commercial operators.[10] Courts evaluating relationships similar to those here have looked beyond the form of contractual agreements to the substance of

[10] Appellants also argue that even if the shippers did not have operational control, the operator must be deemed to be Air-Trans Ltd., a Bahamian corporation and thus a foreign operator subject to 14 C.F.R. Part 129 rather than Part 121. But Landy, not Air-Trans, was found to have operated the plane for compensation or hire. Moreover, Part 129 does not apply unless the foreign air carrier holds a permit issued by the Civil Aeronautics Board under 49 U.S.C. § 1372. Air-Trans Ltd. was not such an air carrier, *see* 49 U.S.C. § 1301(3), (10), (23) (1976 & Supp. IV 1980), and had never acquired a CAB permit. Moreover, the parties briefed and argued this issue on the first appeal. This court implicitly rejected the argument in its reversal on other limited grounds. *See Landy v. FAA*, 635 F.2d at 147-48.

actual aircraft operations, sanctioning those who effectively operate an aircraft for compensation or hire in violation of FAA safety regulations. *See e.g., Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598, 601-03, 611-13; (E.D. Pa. 1974) (three judge court); *United States v. Bradley*, 252 F. Supp. 804, 805 (S.D. Tex. 1966). The evidence at trial was clearly sufficient to support the jury's finding that Landy and IAL operated the aircraft for compensation or hire and were therefore subject to Part 121 safety regulations. *See United States v. Ozark Air Lines, Inc.*, 419 F. Supp. 795, 799 (E.D. Mo. 1976); *United States v. Garrett*, 296 F. Supp. 1302, 1304 (N.D. Ga.) (liability for civil penalties by preponderance of the evidence), *aff'd*, 418 F.2d 1250 (5th Cir. 1969) (per curiam), *cert. denied*, 399 U.S. 927 (1970).

C. *The Jury Charge*. Appellants also assert that the trial court's charge on operational control was erroneous, and tainted the jury's verdict. The Special Verdict form asked as to Landy and IAL: "Do you find by a preponderance of the evidence that defendant . . . operated the aircraft for compensation or hire?" Landy and IAL first argue that the phrase "operated the aircraft" does not match FAR 121.3(f) which specifies that "[n]o person . . . may engage in the carriage of persons or property for compensation or hire in air commerce without, or in violation of a commercial operator operating certificate and appropriate operations specifications issued under this part." We note first that the trial judge did use the regulation's language ("engage in") in instructing the jury. Second, the violation requires no finding of intent, and we fail to see how the jury would have been misled by the semantic distinction between "to operate" and "to engage in."

Landy and IAL additionally argue that two instructions, which we set out in the margin,[11] misstated the law. *Aircrane v. Butterfield*, *supra*, 369 F. Supp. at 611-12, is, however, adequate authority for an instruction that recommendation of crews is probative on the question of operational control. Every flight employed an Air-Trans crew, and the jury could reasonably infer that the crews came with the plane. The second challenged instruction is little more than a truism; Landy's counsel agreed that if the lessor and the crew supplier keep operational control, then the lessee does not. Further, the instruction is supported as a matter of law by *Shaffer v. Golden Eagle Aviation, Inc.*, 1 NTSB 1028 (Jan. 6, 1971). Finally, IAL claims error in the court's failure to charge on agency. Agency, however, was not an element of the complaint, and was not in issue. The court properly charged on operational control. In sum, we have examined the contention that the court's charge erroneously led the jury to its key finding on Landy's and IAL's role, and find the arguments insubstantial.

D. *Evidentiary Rulings.* Appellants objected to exclusion of opinion testimony by one witness, a former FAA District Office Supervisor, who would have testified as to

[11] I have already explained the statute and the regulations to you and told you that the operation of an aircraft hinges on control, direction and responsibility for its operations. I now instruct you that where a lessor and/or its agent undertakes to recommend to its sublessees flight crews which are identical for each lease and for each operation, such fact is probative on the question of whether the lessor and/or agent shifted operational control of the aircraft to the sublessee.

It is also the law that where an aircraft and crew for the transportation of a shipper's cargo is furnished by different parties but the supplier of the plane and the supplier of the crews are related in some way, and the net effect of these acts is to leave responsibility for the operation of the aircraft in the lessor and/or the person furnishing the crew, and the flight crews exercise complete control over the aircraft, then the lessee does not operate the aircraft.

industry practice and FAA policy concerning operational control of a leased aircraft under Part 91, as reflected in Advisory Circulars. The testimony was properly excluded for two reasons. First, questions soliciting the former FAA employee's understanding of the meaning and applicability of Part 91 and Part 121 FARs would invade the province of the court to determine the applicable law and to instruct the jury as to that law. *See, e.g., United States v. Ingredient Technology Corp.*, No. 82-1128, slip op. at 1044-46 (2d Cir., Jan. 5, 1983) (tax evasion); *Marks & Co. v. Diner's Club, Inc.*, 550 F.2d 505, 509-12 (2d Cir.) (contracts), *cert. denied*, 434 U.S. 861 (1977). Second, industry practice and FAA policy (apparently suggesting that others operated aircraft for "meat hauling" under Part 91 rather than Part 121) were irrelevant to the jury's determination of violations of the regulations, which requires no finding of intent. *Compare* 49 U.S.C. § 1471 (civil penalties for any violation) *with* 49 U.S.C. § 1472 (criminal penalties, requiring proof of knowing and willful violation). If the testimony had been offered to show good faith confusion as to applicability of Part 91 regulations to this type of aircraft leasing, the testimony would be relevant to the sanction issue, *see, e.g., United States v. Bradley, supra*, 252 F. Supp. at 805-06, but this was not an issue of fact for jury consideration.

For the same reason of relevancy, the court properly excluded warning letters to the plane's flight crews, which defense counsel would have offered to show that the violations were deemed by the FAA not to be serious, or not to involve a threat to safety. The issue of seriousness of the violations, like the issue of good faith confusion, goes to the scope of the penalties imposed. Imposition of penalties is committed to the court, not the jury. *United States v. Duffy*, 550 F.2d 533, 534 (9th Cir. 1977) (per

curiam). The court did receive all this evidence in Landy's post-trial papers submitted on the question of penalties.

IAL objects on grounds of unfair surprise to the admission of testimony of the FAA Regional Counsel, who was not listed as a Government witness, but was nonetheless called as a rebuttal witness. The substance of his testimony came as no surprise, because he had testified at the first trial. *See* note 1 *supra*. Further, even though the government had indicated that it was not going to call this witness, it was proper to do so in rebuttal and impeachment of IAL's president's testimony that he had been assured by the FAA that his operation was proper.

Two other evidentiary rulings on the issue of operational control are raised on appeal. The Government was allowed, over a hearsay objection, to put in evidence a telex sent by the German government through the State Department to the FAA. The telex went to rebut the testimony of a shipper that in order to get landing rights, he had satisfied the German government that a flight from Germany to New York was not a commercial operation. The telex informed the Government that Germany would not permit the aircraft to enter German air space in the future because it had been operated on that flight without approval by the German government. The telex was identified by the FAA inspector to whom it had been sent. As a statement by a foreign government to the federal government, incorporated in the FAA's factual findings resulting from an investigation made pursuant to authority granted by law, the telex was admissible as a public record and report under Fed. R. Evid. 803(8)(B), (C). *See United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976).

III. The Flights

If the jury found by a preponderance of the evidence that Landy and IAL operated the plane in air commerce for compensation or hire, the next step was to identify the flights. Landy and IAL raise three issues here.

A. *The Flight List.* Violations of FARs occur when an aircraft is in operation. Further, the civil penalty scheme of the Federal Aviation Act makes each day of continuing violations a separate offense. The Government therefore put in documentary as well as testimonial evidence (such as the plane's log book and pilot's deposition) from which the jury could find as fact that specific flights had occurred. The court permitted a list of these alleged flights to accompany the jury, and Landy objects because the list was never offered in evidence. At trial, however, his objections were different. He successfully objected to the inclusion of references to exhibits or testimony purporting to establish each flight. He unsuccessfully objected to including flights that were not alleged in the Government's pleadings. Under the Federal Rules, however, when issues "not raised by the pleadings are tried by express or implied consent of the parties," the pleadings are, in effect, amended. Fed. R. Civ. P. 15(b). If Landy and IAL felt that admitting evidence as to those flights prejudiced their defense on the merits, the appropriate response would have been to move for a continuance. *Id.* As to the grounds raised here for the first time, we simply note that Judge Carter stated that the list "contains the dates and flights on which the government alleges that there were violations; some 43 are listed." So far as we can see this was a perfectly proper aid to the jury in its deliberations on a factual issue. *Compare First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1315 (5th Cir. 1977)

(court permissibly gave jury written outline of elements necessary to convict defendant), *cert. denied*, 435 U.S. 952 (1978) and *Shane v. Warner Manufacturing Corp.*, 229 F.2d 207, 209-10 (3d Cir.) (court permissibly gave jury written computation of damages prepared by plaintiff's counsel), *appeal dismissed*, 351 U.S. 959 (1956); *with United States v. Adams*, 385 F.2d 548, 550-51 (2d Cir. 1967) (court impermissibly gave jury incriminating writings by government agent which had not been received in evidence).

B. *The Log Book*. Appellants raise as error the admission in evidence of the aircraft log book. The basis of their objection was lack of foundation, authenticity, completeness, and accuracy. There was deposition testimony from a pilot, however, that he was required to fill out a maintenance log on each flight and that maintenance problems would be routinely noted in the log. This, coupled with the testimony of John Burns of IAL that the log book was kept on the aircraft and that it was reviewed regularly in the course of business, supports admissibility as a record within the ambit of Federal Rule of Evidence 803(6).

C. *Jurisdiction Over Foreign Flights*. On June 3, 1977, the plane transported cargo from San Jose, Costa Rica, to Caracas, Venezuela; on July 10, 11, 12, 14 and 15, 1977, the plane, subleased to LANICA, the Nicaraguan National Airlines, flew meat from Managua, Nicaragua, to Caracas, Venezuela. We are asked to consider whether the FAA properly could assert jurisdiction over these foreign flights.

We have set forth the regulatory scheme above. The Federal Aviation Administration's mandate is "to promote the safety of flight of civil aircraft in air com-

merce," 49 U.S.C. § 1421(a)(6), and it is "air commerce" of commercial operations that is regulated by Part 121 of 14 C.F.R. "Air commerce" is defined by the Act to mean "interstate, overseas or foreign air commerce . . . or any operation or navigation of aircraft which directly affects, *or which may endanger safety in, interstate, overseas or foreign air commerce*." 49 U.S.C. § 1301(4) (emphasis added). The safety of foreign air commerce—"the carriage by aircraft of . . . property . . . for compensation or hire . . . in commerce between . . . a place in the United States and any place outside thereof" 49 U.S.C. § 1301(24)(c)—may most certainly be endangered on the facts proved at trial. The endangerment is twofold. First, other United States planes fly from the United States to these international airports, including scheduled passenger flights to Caracas and San Jose. Second, the plane at all times employed a United States crew supplied by Air Trans. Recognizing that the term "air commerce" will be broadly construed to effectuate a valid congressional purpose, *see, e.g., United States v. Healy*, 376 U.S. 75, 83-85 (1964); *United States v. Busick*, 592 F.2d 13, 20 (2d Cir. 1978), we do not find that appellants have raised any compelling arguments against FAA jurisdiction over these flights. We distinguish *Hansen v. Arabian American Oil Co.*, 100 F. Supp. 183, 184-85 (E.D.N.Y. 1951), *aff'd on other grounds*, 195 F.2d 682 (2d Cir.), *cert. denied*, 344 U.S. 828 (1952), where the operation of a private plane solely within a foreign country was held not within the ambit of the FAA rules. We specifically reject the contention that jurisdiction intrudes into the sovereignty of a foreign power. Quite simply, the FAA is fining an American entrepreneur and business entity, not the national ariline of Nicaragua. If LANICA in fact had operational control of the plane, rather than Landy, IAL, and the

Air-Trans crew, there would not have been any violation of Part 121 regulations.

IV. The Violations

Landy and IAL's factual defense concentrated on the inapplicability of Part 121 regulations to their operations, rather than on controverting the Government's proof of specific violations. They contend, however, that erroneous rulings and jury instructions affected the jury's findings of violations.

A. *Deposition Notice.* The Government's evidence was offered in part by the deposition testimony of a pilot, Robinette, employed by Air-Trans for nearly half the flights in question. Landy contends that his due process rights were infringed by admission of this testimony because defense counsel lacked adequate notice that the deposition would be taken.[12]

The Federal Rules require reasonable written notice to opposing counsel before the taking of an oral deposition. Fed. R. Civ. P. 30(b)(1).[13] Ten days before trial, the Government located an Air-Trans pilot, who was unavailable for trial in New York. The Government notified defense counsel on Monday of the taking of Robinette's deposition on the following Friday in Tampa, Florida. During those four days defense counsel neither contracted

[12] Landy also urges that the taking of the deposition violated the pretrial scheduling order. The only such order, however, closed depositions on October 20, 1978, i.e. for the first trial, *see* note 1 *supra*. Judge Carter had not issued a scheduling order for the second trial.

[13] A witness's deposition may be used at trial for any purpose against any party "who was present or represented at the taking of the deposition or who had reasonable notice." Fed. R. Civ. P. 32(a)(1), if the witness is over 100 miles from the courthouse. Fed. R. Civ. P. 32(a)(3)(B).

the government's attorney, *see* S.D.N.Y. Civil Rule 3(f), nor sought expedited relief from the court, *see* Fed. R. Civ. P. 30(b)(3), but rather mailed a motion returnable eleven days later seeking an order vacating the notice. It is clear, however, that it is not the filing of such a motion that stays the deposition, but rather a court order. *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965). The court may take judicial notice of frequent flights from New York to Tampa, as well as availability of procedural remedies, in concluding that the deposition notice was reasonable. *Compare Mims v. Central Manufacturers' Mutual Insurance Co.*, 178 F.2d 56, 59 (5th Cir. 1949) (notice of taking sixteen depositions in ten cities on the same date, served ten days before trial not "reasonable notice"). The trial court did not abuse its discretion in permitting the deposition testimony.

B. *The Inspection Manual.* Landy objected on grounds of irrelevance and prejudice to the admission of an inspection manual for the plane used by IAL in the course of its operations. The manual (which was in fact appropriate for a Convair 880 rather than for a Boeing 707) was relevant on the issue whether the defendants had violated FARs 121.367 and .369; an improper manual may not be used to inspect or maintain the aircraft. Because the manual was relevant, it was properly within the court's discretion to evaluate whether its probative value outweighed any prejudicial effect. Fed. R. Evid. 403; *Berman Enterprises Inc. v. Local 333, United Marine Division ILA*, 644 F.2d 930, 938-39 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981).

V. The Penalty

The penalty scheme of the Federal Aviation Act explicitly subjects "any person" who violates subchapter VI of the Act or any regulation issued thereunder to a civil fine not to exceed $1,000 for each violation. 49 U.S.C. § 1471(a)(1). Each day of a continuing violation is a separate offense.[14] *Id.* Penalties should reflect the nature, circumstances, extent, and gravity of the violation; the culpability, history of prior offenses, ability to pay, and effect on the ability to continue to do business of the person fined; and "other matters as justice may require." *Id.* The Secretary of Transportation may compromise any civil penalty, 49 U.S.C. § 1471(a)(2), but where the parties do not agree on payment of the penalty, as in the present case, the agency may bring a collection proceeding in federal district court. 49 U.S.C. § 1473(b)(1).

This authority and the district court's role is not seriously challenged, nor could it be, especially where, as here, the facts constituting violations were found by a jury. *See, e.g., United States v. Ward*, 448 U.S. 242, 248-51 (1980); *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 450-51 (1977); *Helvering v. Mitchell*, 303 U.S. 391, 401-04; *United States v. J.B. Williams Co.*, 498 F.2d 414, 421-22 (2d Cir. 1974). *See generally* K. Davis, 1 *Administrative Law Treatise* § 3:11 (2d ed. 1978). Landy does, however, attack the sanctions as "grossly disproportionate" and "unreasonably harsh" under the circumstances. We address Landy's challenge to the manner in which the violations were counted.[15]

[14] Judge Carter's calculation on a per flight rather than per day basis, see note 3 *supra*, is not error because each flight occurred on a separate day.

[15] We put aside Landy's Eighth Amendment claim, finding it frivolous in the light of the Supreme Court's rulings in *Rummel v. Estelle*, 445

The gravamen of Landy's argument on appeal is that the district court "double counted" violations. At first glance, some violations, *see* note 2 *supra*, do appear to be duplicative. Failure to prepare a manual, for example, necessarily causes violation of the requirement to furnish a copy to the FAA, or to have a maintenance organizational chart or emergency crew functions in the manual, or to have the required manual on the plane for use by the crew, or to include in the manual a procedure to certify pilot familiarity with a route or airport. Failure to establish a crew and dispatcher training program subsumes failure to obtain FAA approval of the nonexistent training program. On further reflection, however, we find that the violations are distinct.

The test of whether charges are multiplicious is, in important part, one of legislative intent. Congress should indicate clearly that it contemplated separate violations, because a determination that separate violations are involved makes it possible to fine cumulatively. *See generally* 1 C. Wright, Federal Practice and Procedure 2d § 142, at 476-78. *See also United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981). The regulatory scheme at issue here clearly states discrete harms. A person who complies with some of the manual requirements, for example, but fails to furnish a copy to the FAA, is subject to a fine for that one discrete violation. It would be anomalous to reward the person who totally ignores the manual requirements by concluding that he, too, is subject to but a single fine when he simultaneously violates several regulations. Other juries have found multiple violations. *See, e.g., United States v. Lockheed L-188 Aircraft*, 656 F.2d

U.S. 263 (1980), and *Hutto v. Davis*, 445 U.S. 947 (1980), and *Hutto v. Davis*, 445 U.S. 947 (1980) (vacating) *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (en banc)).

390, 393 (9th Cir. 1979) ($165,600 in fines for 552 separate violations of Part 121 regulations).

Landy and IAL carry this unsuccessful argument to its logical extreme when they state that because the plane did not have a Part 121 certificate, it could not operate in violation of Part 121 regulations, which they say bind only certificate holders. A plain reading of the regulations refutes the argument. FAR 121.4 specifically makes the Part 121 rules apply not only to certificated persons, but "also to any person who engages in an operation governed by this part [Part 121] without the appropriate certificate and operations specifications."[16]

As well as challenging the manner in which the violations were counted, Landy and IAL challenge the court's consideration of matters not determined by the jury. The statute makes it explicit, as we have noted above, that penalties should reflect a broad range of factors. Judge Carter addressed these factors in his opinion and we find no ground for concluding that he abused his discretion.

The Federal Aviation Act requires carriers "to perform . . . services with the highest degree of safety in the

[16] Landy raises the reverse argument in challenging the court's charge to the jury on specific violations, and we also reject this argument. Thus, he claims that operation of the aircraft without a ground proximity warning system (FAR 121.360), a flight data recorder (FAR 121.343), a life raft (FAR 121.339), or a first aid kit (FAR 121.309) would subject only the airmen, not the owner-operator, to fines, because these regulations go to the conduct of a "person," not a "certificate holder." The former term, however is broader, not narrower, than the latter. The Act defines "person" to mean "any individual, firm, copartnership, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof." 49 U.S.C. § 1301(32) (Supp. IV 1980). Further "airmen" is defined by the statute, *id.* § 1301(7), and the FAA would have used that narrower term if parts of the regulations were to be applicable only to those individuals. *See, e.g., United States v. Duncan*, 280 F. Supp. 975 (N.D. Tex. 1968) (pilot shall use oxygen mask, FAR 121.333(c)(31).

public interest." 49 U.S.C. § 1421(b). The regulations outline minimum standards of safety. 49 U.S.C. § 1421(a)(6); *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 75 (2d Cir. 1980). As the district court noted,

> [f]ailure to comply with regulations relating to training of personnel, equipment, facilities and operational procedures poses a serious public hazard. The FAA . . . . must depend largely on voluntary adherence to the rules it promulgates . . . . While there is no evidence of an actual danger to public safety on any flight in which defendant bypassed the FAA regulations, that fortunate happenstance is totally irrelevant. The violations trenched broadly on all the substantive requirements for commercial operations designed to insure public safety and were in cavalier contempt for the regulatory system itself. Since there can be no issue here of mistake or inadvertence, at the very least, these violations require sanctions as a guard against similar violations by others in the future.

Landy v. FAA, 16 Av. Cas. (CCH) 18,165, 18,166 (S.D.N.Y. Feb. 9, 1982).

Landy and IAL have failed in their arguments on appeal, and the judgment of the district court is hereby affirmed.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

Because air safety ranks somewhere in pecking order between motherhood and the American flag, it would be

easy to concur fully in the majority opinion. In explaining my inability to do so, a good starting point is the following excerpt from the district court's opinion:

> While there is no evidence of an actual danger to public safety on any flight in which defendant bypassed the FAA regulations, that fortunate happenstance is totally irrelevant.

In pursuance of this logic, the district court fined appellants $21,000 because instructions on the first aid kit in appellants' German-built cargo plane were printed in German. Section 121.309(a) and (b) of Vol. 14 of the Code of Federal Regulations provides that no person may operate an airplane unless it is equipped with one or more first aid kits. Although section 121.309(b)(3) requires only that such a kit be "clearly identified and clearly marked to indicate its method of operation", the district court charged that, for such instructions to be clear, they must be in "language understandable to the crew." Assuming without deciding that "language understandable to the crew" was necessary to identify the first aid kit on appellants' plane and to indicate its "method of operation", there is no proof that one or more members of appellants' crew did not understand German. Indeed, the fact that some entries in the plane's logbook during the period at issue were made in German would indicate that such understanding did exist.

Appellants were fined another $21,000 because placards on the crew's life raft were printed in German. Once again, the Government completely failed to establish that appellants' crew, experienced in plane operation and international travel, were unable to identify the device in question as a life raft or to understand how it operated. Moreover, the district court erred prejudiciously when it

permitted the FAA maintenance inspector to testify he "felt" that instructions in German were contrary to regulations but prohibited defense counsel from eliciting a contrary answer on cross-examination.

Although, as the district court found, there was "no evidence of an actual danger to public safety" from violations such as the use of German language on the crew's first aid kit and life raft, the district court's conclusion that "this fortunate happenstance is totally irrelevant" is not entirely true. Seven of the twenty-eight flights, for which liability totalling $94,500 has been imposed, were conducted entirely outside the United States. Six of these flights were between Managua, Nicaragua and Caracas, Venezuela, while the plane was leased to Lineas Aereas de Nicaragua, that country's national airline. The seventh was between San Jose, Costa Rica and Caracas. The Government did not allege in its pleadings that FAA regulations were violated on those flights. This, I suggest, was because the FAA, and perforce the district court, were without jurisdiction to impose liability for conditions existing during the seven flights, which, as the district court found, posed no danger to public safety.

The FAA is empowered "to promote safety of flight of civil aircraft in air commerce" by promulgating appropriate standards and regulations. 49 U.S.C. § 1421. "Air commerce", as defined in 49 U.S.C. § 1301(4) and (20) refers only to flights that originate or terminate in the United States or its territorities or which "may endanger safety" in flights that do. The majority's assertion that flights in and out of the United States "may most certainly be endangered on the facts proved at trial", is unwarranted. There is not one iota of proof in the record to rebut the district court's finding of no actual danger to

public safety, much less sufficient proof to make that finding clearly erroneous.

As pointed out in our first opinion, 635 F.2d at 147, the Government has "thrown the book" at appellants in an attempt to secure the largest possible fine. This is FAA's admitted policy:

> . . . [W]hen we feel there is a serious violation or serious numbers of violations that requires significant deterrent effect, we have been forced to go out and scrape up every possible violation of the Regulations that is appropriate in order to compute these large penalties.

Testimony of Clark Onstad, Chief Counsel, FAA before the Subcommittee on Aviation of the Committee on Public Works and Transportation, House of Representatives, 96th Cong., 2d Sess. July 1, 1980, Record of Hearing on H.R. 7488 at 38.

Even the district judge, whose sympathies quite obviously were not with appellants, could not abide the Government's attempt to make two flights out of each carriage of goods from the United States to Europe because the plane had to refuel at Gander, Newfoundland.

I agree with my colleagues that appellants violated the law and must be held to account. I would affirm a judgment against appellant Landy in the amount of $250,000 and against appellant International Aircraft Leasing, Inc. in the amount of $125,000. To the extent that the judgments appealed from exceed those amounts, I respectfully dissent.

Opinion of the District Court

16 Avi. Cas. (CCH) 18,165 (S.D.N.Y. 1982).

FEDERAL AVIATION ADMINISTRATION AND UNITED STATES OF AMERICA v. M. MARSHALL LANDY AND INTERNATIONAL AIR-AIRCRAFT LEASING, INC.

United States District Court, Southern District of New York, February 9, 1982.

FEDERAL AVIATION REGULATIONS—VIOLATIONS—CIVIL PENALTIES.—Civil penalties were imposed on an individual and corporate defendant that had been found by a jury to have operated an aircraft for hire in violation of the Federal Aviation Regulations. Severe sanctions were appropriate because of the scope and seriousness of the violations, the lack of good faith on the part of the defendants, and the defendants' ability to pay.

Back reference: ¶ 16,902.06.

John S. Martin, Jr., Michael H. Dolinger and Steven E. Obus, New York, New York, for plaintiffs.

Frank H. Granito and Speiser & Krause, P. C., New York, New York, for Landy.

Howard F. Cerny, New York, New York, for IAL.

Before Carter, D. J.

Opinion

On retrial on October 5, 1981, after seven days of hearings, the jury returned a special verdict by re-

sponding to numerous interrogatories posed by the court. In substance they found that between May 2, 1977, and August 2, 1977, defendants Marshall Landy and International Aircraft Leasing, Inc. ("IAL") had operated a Boeing 707, N9985F for hire on 43 separate flights in violation of 27 Federal Aviation Administration ("FAA") regulations on each of these flights and on one flight had, in addition, failed to have life vests on the aircraft over water in violation of a 28th FAA regulation.

Pursuant to agreement of the parties, the question of penalties is presented to the court for determination without a further evidentiary hearing. This does not imply, as defendant Landy points out, that the parties waived their right to present proof and argument on this issue, but rather that they opted to submit such material to the court on papers for its consideration. The court studied and considered all the documents—the affidavits, briefs and letters—submitted by counsel in reaching its conclusions on whether and what penalties should be imposed against defendants.

The FAA regulations are designed to insure safety in air space, 49 U. S. C. § 1421(a), and are clearly in the public interest. See, *e.g.*, *Doe* v. *CAB* [9 Avi. 18,062], 356 F. 2d 699, 701 (10th Cir. 1966). It is established on this record beyond question that defendants chose to ignore the FAA's regulatory scheme on the theory that theirs was not a Part 121 operation for hire but was a private operation as defined by Part 91. Defendants, however, neither sought to bring their operational activities to the attention of FAA authorities for a determination as to whether Part 121 or Part 91 controlled their functions, nor did they apply for an

FAA commercial operator's operating certificate. Under the circumstances, defendants operated at the risk that the violations attributed to them would be found. The commercialization of defendants' activities, their extensive aviation experience, their necessary familiarization with FAA regulations and the fact that the operations involved fall squarely within Part 121 make it impossible for the court to conclude other than that the violations were both deliberate and willful and in contemptuous disregard of the FAA and its regulations.

The United States' airways are crowded. Failure to comply with regulations relating to training of personnel, equipment, facilities and operational procedures poses a serious public hazard. The FAA has limited resources and cannot oversee all the aircraft using the nation's airways to determine whether all are in compliance with FAA procedures. It must depend largely on voluntary adherence to the rules it promulgates. The system has undoubtedly worked well because the safety of all those operating in or using the airways is at stake. While there is no evidence of an actual danger to public safety on any flight in which defendant bypassed the FAA regulations, that fortunate happenstance is totally irrelevant. The violations trenched broadly on all the substantive requirements for commercial operations designed to insure public safety and were in cavalier contempt for the regulatory system itself. Since there can be no issue here of mistake or inadvertence, at the very least, these violations require sanctions as a guard against similar violations by others in the future.

Landy's involvement is clear. Henry Wharton and the latter's Air Transport Company were Landy's agents

and supplied the air crews for all the flights involved in this litigation. Wharton found the 707 for Landy and accompanied Landy to Germany to purchase the aircraft and return with Landy when the aircraft was brought from Germany to Miami. He supervised the refitting of the 707 for the carriage of cargo, oversaw its maintenance, and was responsible for the preparation of the inspection program for the aircraft. He acted for Landy in seeking out business for the plane; he found and negotiated with IAL for lease of the aircraft and delivered the plane to IAL in New York. While the plane was on lease to IAL, Wharton supplied the crew, was in contact with crews either from Miami or New York and assured availability of maintenance facilities in Europe. When Landy terminated the IAL lease, Wharton was sent to New York to notify IAL and when Landy sought to repossess the plane, Wharton was delegated to do that. Wharton ran the aircraft operation under Landy's instructions and was to receive a share of any profits Landy made in the enterprise.

Moreover, Air Transport was listed as the buyer of the aircraft from Lufthansa, although Landy supplied the money for the plane. Wharton used Landy's office to transmit Air Transport business which included contacting crews, all of which were supplied through Air Transport. The crews were paid in checks signed by Landy's secretary and when the plane was leased to Nicaragua National Airlines, Wharton supplied the crews.

Landy has been in the aircraft leasing business for some 25 years. He bought the aircraft for a business venture and all the facts pointed to a partnership

or close business relationship between him and Wharton in this regard. Yet, throughout this proceeding Landy has sought to blur his involvement including giving perjured testimony. From his testimony on the witness stand one would have concluded that he and Wharton were casual acquaintences. He professed only the vaguest knowledge of Air Transport or of Wharton's activities and yet the evidence had established that Wharton used Landy's offices and secretary regularly to conduct Air Transport business. The jury obviously did not believe him and found him liable for transgression of FAA regulations. His testimony is surely evidence of bad faith and is so assessed for the purpose of determining whether sanctions should be imposed.

Wharton and Air Transport were Landy's agents. Through them Landy maintained operational control of the aircraft in particular by supplying the crews. He operated knowingly in willful violation of the regulations.

IAL is similarly guilty of knowing and intentional disregard of applicable FAA regulations. John Burns, the principal of IAL, had first operated Burns Aviation. At that time FAA had found his activities in violation of Part 121. He had been advised of Part 121 requirements and warned that it would be impossible for cattle shippers with no aviation background to maintain operational control of an aircraft.

The manager of Stewart Airport testified in regard to the instant litigation that all charges related to the maintenance and operation of the 707 were billed, on IAL's instructions, to IAL and J. D. Smith and never to the shippers. While the sub-lease agreements recite that the shippers were solely responsible for the aircraft and main-

tained "full and exclusive possession, use and control" of the aircraft (Govt. Ex. 7-14). Burns knew the shippers were not involved in any material way in the operation of the aircraft. On the contrary, Burns supervised the day-to-day operation of the aircraft. Accordingly, IAL committed a knowing violation of Part 121.

There is no doubt of Landy's capability of paying. He purchased three Boeing 707's for half a million dollars and is, according to his counsel, a man of considerable wealth.

IAL and Burns Aviation are no longer in operation. IAL, however, did make considerable profits, and although the full amount is not revealed in the record of this trial, Gov't Ex. 13 shows that IAL could have earned as much as $60,000 on any one of the flights involved in the litigation.

The Federal Aviation Act makes it unlawful for any aircraft to use airspace in violation of FAA regulations, 49 U. S. C. § 1430(a)(5). Each person guilty of violating the regulations may be fined up to $1,000 per violation. 49 U. S. C. § 1471(a)(1). The court is empowered to set the penalty when violations have been established. *United States* v. *Duffy*, [14 Avi. 17,743], 550 F. 2d 533, 534 (9th Cir. 1977). The controlling considerations in determining the civil penalty are the scope and seriousness of the violations, whether the party acted in good faith and his ability to pay. *United States* v. *J. B. Williams Co.*, 498 F. 2d 414, 438 (2d Cir. 1974).

Public interest in safety in the air is too great to permit less than vigorous and firm sanctions against those who deliberately and knowingly and in bad faith disdain compliance with the regulations, as was done here. De-

fendants also meet the third criterion—ability to pay the fine imposed. Thus civil penalties will be assessed.

The jury found that 43 flights for hire had been made without compliance with Part 121 requirements and that a total of 1,162 violations had occurred on these flights. The government urges that a penalty of $500 per violation be imposed on Landy for a total civil penalty of $581,000 and $250 per violation be imposed on IAL for a total civil penalty of $290,500. Defendants urge that no penalty be imposed.

The jury found 43 flights by counting as a separate flight each take off and landing, even though a leg of a continuous journey which terminated at some further destination. While I have no quarrel with the jury's determination as to the number of flights, for the purpose of imposing civil penalties, however, the leg of a continuous trip will not be counted as a separate flight. Based on that formula, 28 flights will be counted for the purpose of assessing sanctions against defendants as follows: (1) May 2, 1977, Stewart Airport ("Stewart") to Budapest, Hungary. (2) May 6, 1977, Stewart to Budapest; (3) May 8, Stewart to San Juan; (4) May 9, Stewart to Budapest; (5) May 10, Stewart to Belgrade, Yugoslavia; (6) June 3, San Jose, Costa Rica to Caracas, Venezuela; (7) June 7, Stewart to San Juan; (8) June 7, Stewart to San Juan; (9) June 8, Stewart to San Juan; (10) June 10, New Orleans to San Salvador, El Salvador; (11) June 11, New Orleans to San Salvador; (12) June 13, Stewart to Budapest; (13) June 19-20, Stewart to Leipzig, East Germany; (14) June 21, Stewart to Budapest; (15) June 22-23, Stewart to Budapest; (16) June 25, Stewart to San Juan; (17) June 26, Stewart to San Juan; (18) June 26-27, Stewart to Zagreb, Yugoslavia;

(19) July 10, Managua, Nicaragua to Caracas; (20) July 11, Managua to Caracas; (21) July 11, Managua to Caracas; (22) July 12, Managua to Caracas; (23) July 14, Managua to Caracas; (24) July 15, Managua to Caracas; (25) July 15-16, Stewart to Mashdad, Iran; (26) July 18-19, Bucharest, Rumania to Los Angeles; (27) July 20, Stewart to Zagreb; (28) August 1-2, Hanover, West Germany to Stewart.

On each flight, the jury found some 27 violations. Accordingly, the court will impose civil penalties for 756 violations and assesses against Landy a penalty of $500 for each violation for a total civil penalty of $378,000, and assesses against IAL a penalty of $250 for each violation for a total civil penalty of $189,000.

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

(Filed—May 23, 1983)

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-third day of May, one thousand nine hundred and eighty-three.

No. 82-6132

FEDERAL AVIATION ADMINISTRATION and UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

M. MARSHALL LANDY and INTERNATIONAL AIRCRAFT LEASING, INC.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, M. Marshall Landy,

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
By: Francis X. Gindhart,
Chief Deputy Clerk

A True Copy

A. Daniel Fusaro, Clerk
By: Victoria C. Salton
Deputy Clerk

Federal Aviation Act of 1958

49 U.S.C. §1301 *et seq.* (1976)

§1301(3):

> "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

§1301(4):

> "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

§1301(10):

> "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Federal Aviation Act of 1958

§1301(22):

> "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

§1301(23):

> "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—
>
> (a) place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;
>
> (b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

Federal Aviation Act of 1958

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

§1301(24):

"Interstate air transportation", overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

§1301(31):

"Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

§1424(a) *Air carrier operating certificates; authorization to issue; minimum safety standards; application; issuance*

The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

§1471(a)(1) *Civil penalties; compromise; liens*

Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter or of section 1514 of this title or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued

under subchapter IV of this chapter, or (B) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation, except that the amount of such civil penalty shall not exceed $10,000 for each such violation which relates to the transportation of hazardous materials. If such violation is a continuing one, each day of such violation shall constitute a separate offense. The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. The amount of any such civil penalty for any violation of any provision of subchapter IV of this chapter, or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter shall be assessed by the Board only after notice and an opportunity for a hearing and after written notice upon a finding of violation by the Board. Judicial review of any order of the Board assessing such a penalty may be obtained only pursuant to section 1486 of this title. This

subsection shall not apply to members of the Armed Forces of the United States, or those civilian employees of the Department of Defense who are subject to the provisions of the Uniform Code of Military Justice, while engaged in the performance of their official duties; and the appropriate military authorities shall be responsible for taking any necessary disciplinary action with respect thereto and for making to the Administrator or Board, as appropriate, a timely report of any such action taken.

§1473(b)(1) *Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties*

Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty and, in case the penalty is a lien, by proceedings in rem against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that with respect to proceedings involving penalties other than those assessed by the Board, either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. The fact that in a libel in rem the seizure is made at a place not upon the high seas or navigable waters of the United States shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits in rem in admiralty.

Federal Aviation Act of 1958

14 C.F.R. §1.1 (1982)

(Definitions):

"Commercial operator" means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this Title. Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for hire.

"Operational control", with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight.

14 C.F.R. §121.3(f) (1982)

(Certification requirements: General):

No person (except a person covered by paragraph (a), (b), (c), (d), or (e) of this section) may engage in the carriage of person or property for compensation or hire in air commerce without, or in violation of a commercial operator operating certificate and appropriate operations specifications issued under this part.